Supreme Court, U.S.
FILED
AUG 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1022, 87-1112

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, et al.,
Appellants,

-v.-

BEVERLY MORRIS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* PETER F. VALLONE, et al.

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STATEMENT OF AMICI'S INTEREST

Peter F. Vallone and the individuals joining in this brief are residents of the City of New York, registered voters and duly elected members of the New York City Council. Pursuant to section 21 of the New York City Charter, the Council, which consists of thirty-five members, is vested with the legislative power of New York City. Mr. Vallone serves as Vice Chairman and Majority Leader of that body.

The courts below held that the Board of Estimate deviated from the constitutional principle of one person, one vote by 132.9%. Based on this finding, it is evident that the votes we cast as citizens are seriously debased and diluted.

This is an injury we share with plaintiffs-appellees. But we also suffer a unique injury in our role as City Council Members. Because New York City's substantial budget can only be adopted after the Council reaches an agreement with the Board of Estimate, the votes we cast as legislators on budget matters are infected by the Board's malapportionment. Whether this taint is measured by reference to the 132.9% deviation found by the courts below, the 31% voting disparity propounded by the municipal appellants or the heightened malapportionment resulting from the non-mayoral voting scheme mandated by the City Charter as to budget matters, it is clear that the Board of Estimate is unconstitutionally malapportioned.

We vigorously protest the disenfranchisement of this City's citizens and strenuously object to the spillover effect of the Board's voting disparities as it affects our legislative powers. We respectfully petition this Court to affirm the lower courts' determination that the Board of Estimate's voting structure deprives this City's citizens of their constitutional right to voting parity.

SUMMARY OF ARGUMENT

On remand from the Court of Appeals, the District Court held that the voting system of the Board of Estimate results in a 132.9% deviation from voting parity. The Court of Appeals agreed with the District Court's calculation and upheld its determination that the Board of Estimate's voting scheme was unconstitutional. The methodology adopted by the lower courts in arriving at this conclusion (the "Abate" method) was correct and should be affirmed on appeal to this Court.

Using a different mathematical model, municipal appellants contend that the correct deviation figure is 31%

and that this voting imbalance is constitutionally permissible in light of the special functions performed by local bodies.

The City Council *amici* vigorously disagree and submit that neither the 31% malapportionment figure espoused by municipal appellants nor the 132.9% deviation determined by the lower courts can be justified or excused.

Municipal appellants wrongly argue that the six citywide votes (two each accorded to the Mayor, the City Council President and the Comptroller) constitute a majority voting bloc on the Board and therefore eliminate or substantially reduce the impact of the conceded disparity among the borough votes. This analysis is incorrect on many grounds, but the principal concern of the City Council *amici* is to demonstrate that, however measured, this unacceptable level of malapportionment impacts on a major governmental function, the adoption of the City's budget, and impermissibly impacts on the otherwise legitimate exercise of the City Council's budget powers.

On a technical level, appellants' analysis is based on several faulty premises and is incorrectly limited to cases in which the Board votes at full strength of its citywide members. This blinkered view ignores the special voting provisions which govern the Board's participation in budget matters. Because the City Charter prohibits the Mayor from voting on budget issues, the putative citywide voting bloc is reduced below majority level and the presumed tempering effect of the citywide votes is necessarily lessened. Consequently, the resulting malapportionment is greater with respect to budget matters. It is *amici's* contention that the resulting spillover effect on the Council's legislative processes is unacceptable and unjustifiable in light of controlling constitutional standards.

ARGUMENT

POINT I

THE COURTS BELOW CORRECTLY HELD THAT THE VOTING SYSTEM OF THE BOARD OF ESTIMATE VIOLATES THE ONE PERSON, ONE VOTE PRINCIPLE

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that debasement or dilution of a citizen's vote is tantamount to complete disenfranchisement, and that this result will likely occur when "population is submerged as the controlling factor in the apportionment of seats in the particular legislative body. . . ." *Id.* at 581. Although this Court has recognized the need to accord a certain amount of flexibility to local government institutions to accommodate local needs, *Avery v. Midland County, Texas*, 390 U.S. 474 (1968), cited by municipal appellants (Brief at 27), firmly established the principle that "the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." *Id.* at 484-5. Furthermore, although

> "viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs . . . this [Supreme] Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation."

Andrews v. Koch, 528 F. Supp. 246, 249 (E.D.N.Y. 1981), *aff'd mem.*, 688 F.2d 815 (2d Cir.), *aff'd sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982) (quoting *Abate v. Mundt*, 403 U.S. 182, 185). Cognizant that local bodies should be accorded some latitude in designing suitable

structures, this Court has never indicated that it would accept a deviation of 132.9% (or 31%, if municipal appellants' calculations pass muster) as a constitutionally permissible variance from the principle of "one person, one vote."

We do not intend to repeat at length the various arguments and analyses which defeat appellants' position. In Point II, *infra*, we briefly offer some criticism of certain assumptions made in the Banzhaf Index calculations and propose some arguments to counter municipal appellants' assertion that the outcome of Board votes is determined by a putative citywide voting bloc majority. We believe those issues are adequately aired in the submissions of appellees. We adopt their conclusion that the Board's malapportionment must be cured and respectfully refer this Court to their brief.

Our aim is to highlight the seriousness of the Board's malapportionment as it impacts on the adoption of the City's budget and the spillover effect that malapportionment has on the City Council, specifically as it relates to the Council's exercise of its budget powers.

Section 120 of the New York City Charter provides in relevant part:

> §120. The budget; approval. a. The board of estimate and the council may increase, decrease, add or omit any unit of appropriation in the budget as submitted by the mayor, or add, omit or change any terms or conditions of it.

b. Except as otherwise provided by law, and subject to the veto of the mayor pursuant to section one hundred twenty-one, the board of estimate and the council, by separate concurrent vote of each body, shall adopt a single budget. . . . In the event of a disagreement between the two bodies, each shall appoint members to a conference committee to reconcile differences and to make recommendations to the respective bodies for concurrent vote of each body.

c. If a single budget has not been adopted by the fifth day of June pursuant to subdivision b of this section, the budget and tax rate adopted as modified for the current fiscal year shall be deemed to have been extended for the new fiscal year until such time as a new budget is adopted.

d. *The mayor shall not participate in any action or vote of the board of estimate on the budget.*

. . .

(Emphasis added).[1]

The budget is the framework by which the people of this City set their priorities. Budget allocations quantify City policy and reflect, for example, whether public safety is to be given greater consideration than health matters or if educational needs must be subservient to criminal justice requirements. All of these concerns affect all residents of the City, each of whom is entitled to an equal voice in determining which matters must be given immediate attention and what needs can be deferred.

Notwithstanding the significance of the budget process to the body politic, municipal appellants give, at best, fleeting acknowledgment to what the Court of Appeals

1. These separate voting patterns were noted in the District Court's methodology decision. *Morris v. Board of Estimate,* 592 F. Supp. 1462, 1465, n.2. (E.D.N.Y. 1984).

termed "the Board's substantial role in passing on the City's budget." *Morris v. Board of Estimate,* 707 F.2d 686, 690 (2d Cir. 1983). Municipal appellants minimize the magnitude of the Board's authority over the City's capital and expense budgets (the latter in excess of $25 billion in Fiscal Year 1988), disingenuously arguing that:

> The Board of Estimate . . . has no power to make law. . . . With one limited exception—its narrow participation in the budget-making process—the Board has no say in any action the City Council takes. And, with that one exception, the Board cannot exert power of general applicability to all citizens of New York City.

(Brief at 9). This "narrow participation," in effect, puts the Board on equal footing with the City Council on budget matters.[2] It subjects the Council to the wishes of a grossly malapportioned Board in an arena where the means for implementing and maintaining all of the City's services are determined.

2. Moreover, it represents a substantial and unconstitutional intrusion of an executive body into a purely legislative function and violates the salutary and fundamental principle of separation of powers. The District Court acknowledged the paramount importance of this doctrine and referred to the Board's role in checking the Mayor given his lack of votes on the budget. 647 F. Supp. at 1475. But the Court did not go on to consider the unwarranted participation of the Board, a body of executive officials, in the City Council's legislative processes of budget adoption. We submit that such participation is as equally unconstitutional as the malapportionment of the Board and should provide an alternative ground for affirming the decision below.

At the heart of municipal appellants' argument in support of maintaining the present voting structure of the Board is their contention that majority control of the Board is vested in its citywide members (Brief at 5, 12, 14, 30). Although this argument may have some validity in theory, with respect to non-budgetary matters in which the three citywide officials have a total of six out of eleven votes (but see, pgs. 13-14, *infra*), it is patently untrue with respect to the Board's participation in the budget process, in which the boroughwide interests dominate as a result of the Mayor's exclusion. In budget matters, only two citywide members, having a total of four votes, participate, while the five borough presidents each cast their one vote. Thus, even assuming, *arguendo*, that the Banzhaf Index urged by municipal appellants should apply here, appellants' 31% deviation figure must be adjusted to reflect the Mayor's inability to vote on budget matters. Because the Mayor cannot vote in the budget adoption process pursuant to §129(d) of the New York City Charter, the number of citywide votes is reduced to four. Consequently, the citywide officials' purported influence is lessened from a majority to a minority position and the representational disparity is commensurately increased. This is mathematically demonstrated in Point II, *infra*.

Not only does this supermalapportionment affect the Board's budget decisions, it spills over to and impacts on the City Council's legislative processes. Because the Council can only act with the agreement of the Board, the Council is beholden to a malapportioned body and the Council's decisions on budget matters are necessarily infected by the Board's voting disparity. The City Council has no ability to rectify the resultant malapportionment visited upon it. It should be noted that not even a unanimous vote of the City Council can overrule a majority vote of the Board of Estimate.

The adoption and modification of budgets and fiscal appropriations are functions that are typically committed to legislative bodies such as the City Council. The courts have been particularly vigilant in holding such entities to very low representational variances. *Brown v. Thomson*, 462 U.S. 835 (1983). For this reason, the tolerance of an allegedly innovative, but poorly apportioned structure such as the Board of Estimate to accommodate local exigencies is particularly inappropriate when applied to the exercise of a locality's budget powers. Municipal appellants' argument that the Board of Estimate's voting structure is responsive to the unique nature of New York City government is specious in regard to budget matters. There is nothing inherently unique about the adoption of New York City's budget--except perhaps, its size--which justifies the involvement of a grossly malapportioned Board of Estimate. Contrary to municipal appellants' suggestion, the mere fact that New York City is comprised of five boroughs, each having its own needs and priorities, does not distinguish this City from Miami, or Denver, or any other city which, when making budget decisions, must choose among competing interests. For the purpose of applying the "one person, one vote" principle, there is simply no basis upon which to distinguish the budget adoption process in New York City from other municipalities. As a general proposition, the voting deviations are inexcusable; they cannot be justified in relation to the adoption of the City's budget--a function common to governments everywhere--nor in relation to other, major governmental powers exercised by the Board, such as the adoption of the city's overall land use plan, the Zoning Resolution, or the approval of city-wide contracts. These are not "local," *i.e.*, borough, issues over which the borough presidents should have unequal say. The smaller boroughs simply wield an inordinate amount of power on citywide issues which have no greater impact on their respective citizens than on the citizens of the larger boroughs.

Amici, as members of the City Council, having recently faced, and lost, a similar challenge, are particularly sensitive to the strictures of the Equal Protection Clause as it relates to the one person, one vote issue. This Court, in a memorandum decision, affirmed the rejection of a mix of fair and malapportioned votes within the Council itself, even though the deviation affected less than 25% of the body. In *Andrews v. Koch,* 528 F. Supp. 249 (E.D.N.Y. 1981), *aff'd,* 688 F.2d 815 (2d Cir.), *aff'd sub nom., Giacobbe v. Andrews,* 459 U.S. 801 (1982), the court of appeals affirmed the lower court's holding that malapportionment relating to 10 at-large members (2 from each borough) of the 45-member body, could not be countenanced. The fact that nearly 35 of the Council Members had been properly elected from equally apportioned districts--a number well in excess of any Charter requirement needed to pass any matter or override a mayoral veto--did not insulate the whole body from the malapportionment of less than one quarter of it.

Applying the same reaoning here, 54.5% (6 citywide ballots out of 11 votes on general matters) or 44.4% (4 citywide ballots out of 9 votes on budget issues) will not confer substantial equality on a body whose malapportionment affects 45.5% and 55.6% of its members, respectively.

Moreover, the Board's role in budget matters may easily be eliminated. The City Council already has the statutory authority and functional capabilities to deal with the full range of budget issues. Abrogating the Board's powers over budget matters would only require that the relevant Charter provisions be declared ineffective.

POINT II

MUNICIPAL APPELLANTS' MATHEMATICAL MODEL AND UNDERLYING ASSUMPTIONS ARE INCORRECT

In remanding this case to the District Court, the Court of Appeals noted:

> [T]he fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative.

Morris v. Board of Estimate, 707 F.2d at 690, n. 3. The district court determined, and the court of appeals affirmed, that the citywide votes had no ameliorative effect on the 132.9% deviation found to exist among the borough votes. We believe that determination was proper.

Municipal appellants argue, however, that this gross malapportionment should be adjusted to account for the citywide officials' putative majority voting bloc. We submit that the reasoning and conclusions propounded to validate this construct are incorrect.

We do not claim any special expertise in devising mathematical models which seek to blend citywide and boroughwide votes. But logic and practical analysis compel us to question whether the underlying assumptions of the Banzhaf Index, on which municipal appellants heavily rely, properly calculate this mix, and whether those and other assumptions made by appellants accurately reflect reality.

First, although appellants strongly emphasize the point, there is no evidence in the record that the citywide officials vote as a bloc. As appellees note in their extensive submissions, the Board's actual vote on any matter (reported as a unanimous consensus more than 95% of the time) appears to result from prolonged backroom negotiations and tradeoffs. (Joint Appendix at 94, 245-246). On controversial issues, the citywide members are likely to vote on different sides, and to do so with no consistent alignment from one dispute to another. (Joint Appendix at 246).

Second, we assert that the Banzhaf Index masks genuinely unacceptable voting disparities. According to the municipal appellants, the Index is able to compare the voting power of individual voters by calculating the voting strength of each representative, determining the citizen's ability to affect the election of each representative and adding together the complete voting power each citizen thus holds. (Brief at 35). The Index appears to confuse and improperly aggregate a voter's ability to affect the outcome of an election to public office with a voter's ability to affect the outcome of votes cast by those public officials as members of the Board. The simple amalgamation of these factors is incorrect and appears to create a multiplier effect for the citywide votes that improperly overvalues their influence, thus in turn improperly overvaluing the influence of the citywide officials and "muting" the deviation figure. *See, Morris v. Board of Estimate,* 592 F. Supp. at 1468-70.

If the ultimate question is how much power a citizen has in affecting the outcome of a Board vote, the Banzhaf Index does not account for the fact that *one* borough's vote (*any* borough's vote) may ultimately carry the day if the other ten votes split, a circumstance that the court of

appeals denominated the "kingmaker" effect. 707 F.2d at 691. Nor does it reflect the critical fact that in such a situation, the individual electors' voting powers differ, depending on whether the tie-breaking vote is cast by Staten Island or one of the more populous boroughs. In reality, 350,000 people have as much power to control the outcome of a Board vote as 2,231,000 people because each group is represented on the Board by representatives having the same strength. We submit that this is unacceptable under equal protection standards.

Moreover, the Banzhaf model does not reflect appellants' contention that Board members defer to each other with respect to projects affecting a single borough. Nor does it account for the supposed unanimity of Board votes.

More importantly, the Banzhaf model upon which municipal appellants rely, totally ignores the unique structure which the City Charter establishes for votes relating to the budget adoption process. Modifying the Banzhaf method to reflect the fact that only two citywide officials participate in the Board's budget process, the Board's malapportionment is significantly greater than that propounded by municipal appellants. When the Mayor's exclusion is factored into the Banzhaf model, the maximum deviation from the ideal is almost 50%. Applying the methodology employed by municipal appellants (Brief at 36-37), the total voting power of the two citywide officials who vote on the budget is calculated as follows:

Voting Power of Comptroller (18.84%) =	.0070853
Square Root of City Population (2659)	
Voting Power of City Council President (18.84%) =	.0070853
Square Root of City Population (2659)	
Total Budget Voting Power of Citywide Officials =	.0141706

Employing this figure in the chart used by municipal appellants (Brief at 37) to determine the voting power of a voter in each of the five boroughs, the deviation figures are as follows:

Borough (Population)	*Square Root*	*Voting Power*		*Voting Power*		*Voting Power*	*Deviation*
Brooklyn							
(2,230,936)	1494	.014171	+	.00582	=	.0200	-7%
Queens							
(1,891,325)	1375	.014171	+	.00632	=	.0205	-4.65%
Manhattan							
(1,427,533)	1195	.014171	+	.00728	=	.0214	-.46%
"Ideal"							
(1,414,206)	1189	.014171	+	.00731	=	.0215	0.00
Bronx							
(1,169,115)	1081	.014171	+	.00805	=	.0222	+ 3.25%
Staten Island							
(352,121)	593	.014171	+	.01467	=	.0288	+ 34%
				Total Deviation:			49.36%

Plainly, a deviation of this magnitude is constitutionally unacceptable and unjustifiable. *Amici* urge this Court to reject municipal appellants' attempt to camouflage the Board's primacy in budget matters. The facts are clear and beyond dispute: the adoption of the City's budget is a governmental function of enormous importance. The Board of Estimate, infected by a maximum malapportionment of almost 50%, plays a major role in the budget process. Consequently, as a result of the Charter's requirement that agreement be reached between the Board and the City Council, the Council's legislative

process with respect to the budget is tainted by the Board's malapportionment. This "supermalapportionment" of the nonmayoral Board must compel this Court to effect a cure of the Board's voting schemes by upholding the decisions of the lower courts.

CONCLUSION

For the foregoing reasons, the City Council *amici* respectfully request that this Court affirm the decision of the court below in its entirety.

Dated: New York, New York
August 3, 1988

Respectfully submitted,

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